

NEW YORK STATE
DEPARTMENT OF ECONOMIC DEVELOPMENT
207 GENESEE STREET
UTICA, NEW YORK 13501

In the Matter

- of -

the Application of Blackstone Advanced Technologies, LLC
for Certification as a Woman-owned Business Enterprise
pursuant to Executive Law Article 15-A.

NYS DED File ID No. 60553

RECOMMENDED ORDER

-by-



David A. Murad
Administrative Law Judge
July 7, 2023

This matter considers the written appeal by Blackstone Advanced Technologies, LLC, (“Blackstone” or “applicant”) pursuant to New York State Executive Law Article 15-A and Title 5 of the Official Compilation of Codes, Rules and Regulations of the State of New York (5 NYCRR) parts 140-144, challenging the determination of the Division of Minority and Women’s Business Development (“Division”) of the New York State Department of Economic Development (“DED”) that the business enterprise does not meet the eligibility criteria for certification as a woman-owned business enterprise (“WBE”).

PROCEDURAL HISTORY

1. On December 19, 2018, Ms. Heather Turner, as President, applied on behalf of Blackstone for certification as a woman-owned business enterprise (DED Exhibit 1).
2. On October 26, 2020, the Division denied the application on the following grounds (DED Exhibit 2):
 - (a) The contributions of minority group members or women are not proportionate to their equity interest in the business enterprise, as demonstrated by, but not limited to, contributions of money, property, equipment or expertise, as required under 5 NYCRR former §144.2(a)(1);
 - (b) Minority group members or women do not make decisions pertaining to the operation of the business enterprise, as required under 5 NYCRR former §144.2(b)(1); and
 - (c) Minority group members or women relied upon for certification have not demonstrated adequate managerial experience or technical competence to operate the business enterprise; and have not demonstrated the working knowledge and ability needed to operate the business enterprise, as required under 5 NYCRR former §§144.2(b)(1)(i) and 144.2(b)(1)(ii);

3. Blackstone timely filed a notice of appeal on November 16, 2020 (APP Exhibit 1).
4. A notice to proceed by written appeal was sent to Blackstone on March 15, 2021 (DED Exhibit 3).
5. Applicant submitted its written appeal by letter dated April 21, 2021 (APP Exhibit 2).
6. The Division responded by filing an Affidavit of Glenn Butler, Associate Certification Director, dated May 4, 2023 and a brief submitted by Dennie Byam, Esq., counsel for the Division, dated May 10, 2023.

FINDINGS OF FACT

7. Blackstone is a corporation that was originally formed on December 12, 2013, and is primarily engaged in providing full-service sheet metal fabricating (DED Exhibit 1).
8. Ms. Heather Turner is the President/Manager of Blackstone and has a 53% ownership interest. Mr. Richard Turner is the CEO of Blackstone and has a 47% ownership interest (DED Exhibit 1).
9. Mr. Turner was the sole owner of Blackstone from the formation of the LLC through September 1, 2015, when Ms. Turner received a 51% ownership interest (DED Exhibits 1, 7 and 8). Her capital contribution was a \$ [REDACTED] check from a joint account with Mr. Turner (DED Exhibit 1).
10. On October 24, 2017, Ms. Turner received an additional 2% ownership interest, resulting in her having a 53% ownership interest (DED Exhibit 1). She made an additional contribution of \$ [REDACTED] from a joint account held with Mr. Turner (DED Exhibits 1 and 14).
11. Ms. Turner has a Bachelor's Degree in Business Administration and an Associate of Applied Science Degree in Business (DED Exhibit 7). She described her day-to-day

activities to include hiring/onboarding/disciplinary action/separation of employment for employees, payroll, performance reviews, manage all directors/supervisors, production meeting and on-site tours with customers and makes decisions for new equipment purchases (DED Exhibit 1).

12. The other individuals responsible for managerial operations at Blackstone are Mr. Karl Ackley, the estimator, Ms. Sarah Drake, the CFO, Mr. Dave Reichard and Mr. Robb Jones, the sales managers and Mr. Dave Wilke, the Director of Operations (DED Exhibit 1).

13. Mr. Wilke was the Director of Operations and was in charge of supervising field operations until his retirement in 2020 (DED Exhibits 1 and 9). His successor is Mr. Richard Simon (APP Exhibit 2 and DED Exhibit 15). Mr. Ackley is the Estimator and is in charge of Blackstone's estimating (DED Exhibit 10). Mr. Reichard and Mr. Jones are the sales managers and are in charge of preparing bids and marketing and sales (DED Exhibits 12 and 13). Ms. Drake is the CFO and is part of making the financial decisions and is a signatory of the business account (DED Exhibits 1 and 11).

APPLICABLE LAW

5 NYCRR former §144.2(a)(1) states as follows:

The contribution of minority group member(s) or woman owner must be proportionate to their equity interest in the business enterprise, as demonstrated by, but not limited to, contributions of money, property, equipment or expertise.

5 NYCRR former § 144.2(b)(1) states in relevant part as follows:

- (1) Decisions pertaining to the operations of the business enterprise must be made by...women claiming ownership of the business enterprise. The following will be considered in this regard:
 - (i)...women must have adequate managerial experience or technical competence in the business enterprise seeking certification.
 - (ii)...women must demonstrate the working knowledge and ability needed to operate the business enterprise.

In 2020, 5 NYCRR §§ 140-145 were amended, updating the regulations and clarifying the Division’s interpretations of its regulations. See 2020 NY REG TEXT 548304 (NS)

Current 5 NYCRR § 144.2(c)(2) states as follows:

(2) Operational decisions. Minority group members or women relied upon for certification must make operational decisions on a day-to-day basis with respect to the critical functions of the business enterprise...The critical functions of a business enterprise shall be determined by the division based upon the following factors, but is not limited to:

- (i) The products or services the business enterprise provides to clients; and
- (ii) The means by which the business enterprise obtains contracts or orders.

STANDARD OF REVIEW

On this administrative appeal, applicant bears the burden of proof to establish that Division staff’s determination to deny the application filed by Blackstone for certification as a WBE is not supported by substantial evidence (*see* State Administrative Procedure Act § 306[1]). The substantial evidence standard “demands only that a given inference is reasonable and plausible, not necessarily the most probable,” and applicant must demonstrate that Division staff’s conclusions and factual determinations are not supported by “such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact.” (*Matter of Ridge Rd. Fire Dist. v Schiano*, 16 NY3d 494, 499 [2011]).

The review is limited to such information that was before the division at the time of the denial determination (5 NYCRR 145.2(b)(1)). Evidence that seeks to clarify and explain previously submitted materials will be considered, however new evidence will not be considered. See *Scherzi Systems, LLC v. White*, 197 A.D.3d 1466 (3d Dept 2021).

DISCUSSION

I. Ownership

The Division interprets 5 NYCRR former §144.2(a)(1) to require an applicant to demonstrate that the woman-owner’s contribution came from assets belonging solely to the

woman-owner. Given this criterion, the Division consistently denies applications for WBE certification where, as here, an applicant fails to substantiate the source of the capital contribution by the woman-owner. See *Matter of Otone Mechanical Construction, Inc.*, Recommended Order dated April 24, 2015 (Final Order 17-28, May 2, 2017), *Matter of Spring Electric, Inc.*, Recommended Order dated March 17, 2017 (Final Order 17-21, dated March 27, 2017).

Ms. Turner indicated she contributed \$ [REDACTED] and expertise for her equity interest which she received in 2015 (DED Exhibit 1). However, the \$ [REDACTED] was paid on February 12, 2014, more than one year before she took her equity interest, and the payment was made from a joint account held with Mr. Turner (DED Exhibits 4, 5 and 6). No proof was submitted to support her claim that she provided expertise as part of her capital contribution.

Ms. Turner also paid a further \$ [REDACTED] capital contribution for the additional 2% ownership interest she received in 2017 (DED Exhibit 14). However, this payment came from the same joint account she used for her initial \$ [REDACTED] payment (DED Exhibits 4 and 14). Also, this payment was for the additional 2% ownership interest and no proportional contribution was made for the initial 51% ownership interest.

It is well settled that ownership acquired solely by virtue of marital or community property does not satisfy the requirements of 5 NYCRR former §144.2(a)(1). See *Matter of Otone Mechanical Construction, Inc.*, Recommended Order dated April 24, 2015 (Final Order 17-28, May 2, 2017).

The Division's determination to deny the application on the basis that Blackstone failed to demonstrate that Ms. Turner made contributions to Blackstone in proportion to her ownership interest, as required under 5 NYCRR former §144.2(a)(1) is supported by substantial evidence.

II. Operation

The eligibility criteria for MWBE certification requires that the woman-owner “exercises the authority to control independently the day-to-day business decisions of the enterprise”. See *In the Matter of Upstate Electrical, LLC v. New York State Department of Economic Development*, 179 AD 3d 1343 (3rd Dept. 2020). The woman-owner “must exercise independent operational control over the core functions of the business in order to establish the requisite control for WBE certification...” *J.C. Smith, Inc. v. New York State Department of Economic Development*, 163 AD 3d 1517 (4th Dept. 2018).

Blackstone’s core revenue generating functions of the business involve full-service sheet metal fabrication (DED Exhibit 1). Ms. Turner’s resume does not reflect any prior training, experience or expertise in sheet metal fabrication (DED Exhibit 7). She is not the person supervising those who are doing the work. Mr. Wilke, and now Mr. Simon, is in charge of supervising field operations (DED Exhibits 1, 9 and 15).

The Division’s finding that Ms. Turner does not exercise independent operational control over the core functions of the business, as required by 5 NYCRR former § 144.2(b)(1), is supported by substantial evidence.

Regarding technical competence, where the woman-owner has no training or experience and the operations staff have more substantive and more significant experience, the Division’s determination denying certification is supported. See *In the Matter of Upstate Electrical, LLC*, Recommended Order dated June 11, 2018, Final Order 18-39, dated August 20, 2018.

Regarding managerial experience, the woman-owner must identify the management experience and day-to-day management activities she engaged in. See *Scherzi Systems, LLC v. White*, 187 AD3d 1466 (3rd Dept. 2021).

“Working knowledge” is established by demonstrating an ability to review and evaluate other employees’ work. See *Upstate Electrical, LLC*, supra at 1346.

Mr. Wilke had 26 years of Director of Operations experience before his retirement in 2020 (DED Exhibit 9). Mr. Simon has experience with designing tooling fixtures for welding and machining and experience with 12V electrical systems (DED Exhibit 15). Mr. Ackley is the lead estimator and trained in blueprint reading for manufacturing (DED Exhibit 10). Ms. Turner’s resume reveals no background, expertise, managerial experience or technical competence in the business seeking certification (DED Exhibit 7).

Ms. Turner oversees the administrative portions of the business, while Mr. Wilke, Mr. Simon, Mr. Ackley and others perform the revenue generating operations of the business (DED Exhibits 1, 7, 9, 10 and 15).

The Division’s finding that Ms. Turner did not establish that she, as the woman-owner of Blackstone, had adequate managerial experience, technical competence, nor knowledge and ability needed to operate the business, as required by 5 NYCRR former §§ 144.2(b)(1)(i) and 144.2(b)(1)(ii), is supported by substantial evidence.

CONCLUSION

Blackstone did not meet its burden to demonstrate that the Division’s determination to deny its application for certification as a woman-owned business enterprise with respect to the eligibility criteria at 5 NYCRR former §§ 144.2(a)(1), 144.2(b)(1), 144.2(b)(1)(i) and 144.2(b)(1)(ii) was not based on substantial evidence.

RECOMMENDATION

The Division’s determination to deny Blackstone’s application for certification as a woman-owned business enterprise should be affirmed.

In the Matter of Blackstone Advanced Technologies, LLC
DED File ID No. 60553
Exhibit Chart

Exhibit #:	Description of the Exhibits
DED 1	Application for Certification
DED 2	Denial Letter
DED 3	Notice to Proceed by Written Appeal
DED 4	February 12, 2014 Capital Contribution Check
DED 5	Blackstone's Timeline of Ownership
DED 6	Blackstone Narrative
DED 7	Heather Turner Resume
DED 8	Richard Turner Resume
DED 9	Dave Wilke Resume
DED 10	Karl Ackley Resume
DED 11	Sarah Drake Resume
DED 12	David Reichard Resume
DED 13	Robb Jones Resume
DED 14	October 24, 2017 Capital Contribution Check
DED 15	Richard Simon Resume
APP 1	Appeal Letter
APP 2	Appeal Submission